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Reversed

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~335.~~ 106

JAMES C. BABBITT, ASSIGNEE OF E. MILLER, A BANKRUPT, PLAINTIFF IN ERROR,

vs.

JOHN SHIELDS AND JOHN FINN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED FEBRUARY 12, 1877.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Missouri, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the September term, 1876, thereof, between James C. Babbitt, assignee in bankruptcy of E. Miller, bankrupt, plaintiff, and John Shields and John Finn, defendants, a manifest error hath happened to the great damage of the said plaintiff, James C. Babbitt, assignee as aforesaid, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 27th day of October, in the year of our Lord one thousand eight hundred and seventy-six.

Issued at office in the city of St. Louis, with the seal of the circuit court of the United States for the eastern district of Missouri, dated as aforesaid.

[SEAL.] M. M. PRICE,
Clerk Circuit Court United States, Eastern District of Missouri,
By A. P. SELBY,
Deputy.

Allowed by—

SAMUEL TREAT,
Judge.

2 *Return to writ.*

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the *the* record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof I hereto subscribe my name, and affix the seal of said circuit court, at office in the city of St. Louis, this 8th day of December, A. D. 1876.

[SEAL.] M. M. PRICE,
Clerk of said Court,
By A. P. SELBY, *D. C.*

3 The United States of America to John Shields and John Finn, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., on the

second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Missouri, wherein James C. Babbitt, assignee in bankruptcy of E. Miller, bankrupt, is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Samuel Treat, judge of the circuit court of the United States for the eastern district of Missouri, this 27th day of October, in the year of our Lord one thousand eight hundred and seventy-six.

SAMUEL TREAT,
Judge United States Circuit Court, Eastern District of Missouri.

Due service of the within citation is hereby acknowledged this 28th day of October, 1876.

GIVEN CAMPBELL,
Att'y for the within-named Def'ts in error.

3½ UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

Be it remembered, that heretofore, to wit, on the 29th day of February, 1876, there was filed in the office of the clerk of the circuit court of the United States in and for the eastern district of Missouri a certain petition, which is in words and figures following, to wit:

Petition.

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

In the U. S. circuit court for the east. dist. of Missouri, March term, 1876.

JAMES C. BABBITT, ASSIGNEE IN BANKRUPTCY of E. Miller, bankrupt, plaintiff,
vs.
JOHN SHIELDS AND JOHN FINN, DEFENDANTS.

The plaintiff, James C. Babbitt, who is the assignee in bankruptcy of one E. Miller, a bankrupt, & who was appointed such by the district court of the United States for the western district of Missouri, brings this his action against John Shields & John Finn, citizens of the State of Missouri and residents of the eastern district thereof, and for cause of action states, that heretofore, to wit, on the 27th day of March, A. D. 1872, he as such assignee recovered a judgment in his favor in said district court against one Edward Burgess, for the sum of ($4,236$\frac{25}{100}$) four thousand two hundred & thirty-six & $\frac{25}{100}$ dollars and his costs; that afterwards, to wit, on the 29th day of March, 1872, said Burgess
4 caused to be filed in said district court a writ of error issued out of the circuit court of the United States for the districts of Missouri to reverse the said judgment of said district court, and also caused to be then and there presented to said district court a bond signed by himself as principal and by said John Shields and John Finn as sureties, conditioned that said Burgess should prosecute said writ of error to

effect and answer all damages and costs if he should fail to make good his plea, all of which will more fully appear, reference being had to the record of said cause in said district remaining, and of which record a duly certified transcript is on file in this court, and to which reference is hereby made; that by the order of said district court made in said cause on the 29th day of March, 1872, said bond was approved and said writ of error allowed and ordered to be made a part of said record, as will more fully appear by reference to said transcript; and it was further then and there ordered by said district court, that a citation should be issued in said cause to said Burgess, requiring him to be and appear at a circuit court of the United States to be holden at St. Louis the first Monday of April, 1872, all of which was accordingly done.

And plaintiff further states that the original of said bond is on file in the said district court, and is not in his possession or control, but the same is in the words and figures following, to wit:

5 Know all men by these presents, that we, Edward Burgess, are held and firmly bound unto James C. Babbitt, assignee of E. Miller, bankrupt, in the full and just sum of eight thousand dollars, to be paid to the said James C. Babbitt, assignee of E. Miller, bankrupt, his heirs, executors, administrators, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this 28th day of March, in the year of our Lord one thousand eight hundred and seventy-two.

Whereas lately, at the March term, A. D. 1872, of the district court of the United States for the western district of Missouri, in a suit depending in said court between James C. Babbitt, assignee of E. Miller, bankrupt, plaintiff, and Edward Burgess, defendant, judgment was rendered against the said Edward Burgess, and the said Edward Burgess, defendant, having obtained a writ of error to the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said James C. Babbitt, assignee of E. Miller, bankrupt, citing and admonishing him to be and appear at a circuit court of the United States to be holden at St. Louis the 1st Monday of April next:

Now the condition of the above obligation is such, that if the said Edward Burgess shall prosecute said writ to effect and answer all damages and costs if he fail to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

EDWARD BURGESS. [SEAL.]
JOHN FINN. [SEAL.]
JOHN SHIELDS. [SEAL.]

6 And for a breach of said bond plaintiff states that after being duly served with said citation, and after the due execution of said writ of error, said Burgess did not prosecute said writ to effect nor answer all or any damages or costs on failing to make good his said plea; but that said cause came on to be heard in said circuit court, during the March term, A. D. 1873, and after being duly considered by said circuit court it was by said circuit court, to wit, on the 22d day of March, 1873, duly ordered and adjudged that the said judgment of said district court be and the same was thereby affirmed with costs; all of which will more fully appear, reference being had to the record of said cause in this court remaining, reference being hereby made to the same; that afterwards the said record of said cause was taken from said circuit court to the Supreme Court of the United States, for review

by said Supreme Court, on a writ of error duly issued out of said Supreme Court, and afterwards such proceedings were had in said Supreme Court in said cause as that, on the 25th of October, 1875, it was duly ordered and adjudged by said Supreme Court that the said judgment of said circuit court be and the same was thereby affirmed with costs, and that the said Miller, as such assignee, recover against the said Burgess $107.35 for his costs expended in said cause in said Supreme Court, all of which will more fully appear, reference being had to the duly certified copy of said judgment of said Supreme Court on file herein, and to which reference is now made.

Plaintiff further says that said judgment of said district court
7 is still in full force and effect and is wholly unsatisfied; that said Burgess has not as such paid the same nor any part thereof; that payment thereof has been demanded of him and he has refused payment of the same, and that he, said Burgess, has nothing whereon an execution could be levied to satisfy the same or any part thereof, and the same remains wholly due with interest thereon; that by reason of the matters and things aforesaid there has been a breach of the condition of said bond, and that plaintiff has been thereby damaged in the sum of six thousand dollars, and he therefore prays judgment against said defendants for said sum of six thousand dollars and for his costs herein expended.

NATH'L MYERS,
Att'y for Pl'ff.

And upon the filing of said petition a summons was issued in the words and figures following, to wit:

Summons.

UNITED STATES OF AMERICA,
Eastern District of Missouri, sct:

In the circuit court of the United States in and for said district.

The President of the United States of America to the marshal of the United States in and for said district, greeting:

You are hereby commanded to summon John Shields and John Finn, citizens of the State of Missouri, that they be and appear before the honorable circuit court of the United States in and for the eastern district of Missouri, on the first day of the next term thereof, to be holden at the city of St. Louis, in and for said district, on the third Monday of March next, then and there to answer the complaint of James C. Babbitt, assignee in bankruptcy of E. Miller, bankrupt, citizen of the
8 State of Missouri, as set forth in the petition filed in said court on the 29th day of February, A. D. eighteen hundred and seventy-six.

Hereof fail not, and have you then and there this writ.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 29th day of February, A. D. eighteen hundred and seventy-six. Issued at office in the city of St. Louis under the seal of said circuit court, the day and year last aforesaid.

[SEAL.] M. M. PRICE, *Clerk*,
By A. P. SELBY, *Deputy*.

And endorsed on said summons the marshal made his return in words and figures following, to wit:

Return.

UNITED STATES OF AMERICA,
Eastern District of Missouri, sct:

I return this summons executed by delivering a copy thereof, together with copy of the petition, to the within named John Shields, and by delivering a copy of the summons to the within named John Finn, at St. Louis, within the said district, this 1st day of March, 1876.

H. W. LEFFINGWELL,
United States Marshal Eastern District of Missouri,
By SHURLDS BARNARD,
Deputy.

And afterwards, at a regular term of the circuit court of the United States in and for the eastern district of Missouri, begun and held on the third Monday, the 20th day of March, A. D. 1876, and on the third day of April, 1876, the defendants filed their demurrer to plain-
9 tiff's petition, which demurrer is in words and figures following, to wit:

Demurrer to petition.

U. S. circt. court, east. dist. of Mo.

JAMES C. BABBITT, ASSIGNEE, &C., *vs.* JOHN SHIELDS & JOHN FINN. } No. 770.

Now come defendants, and for their joint and several demurrer say that the petition of the said plaintiff is not sufficient in law, in manner and form as declared, because the said defendants say that—

1st. It does not state facts sufficient in law to constitute a cause of action.

2nd. That the alleged bond upon which the suit is brought is not alleged to have been lost or destroyed, and should have been filed with the petition.

3rd. That plaintiff has no right to recover on said bond, because the names of defendants are not stated in the alleged bond.

4th. Because it does not appear with legal certainty there has ever been any breach of the bond set forth in said petition.

5th. Because the said petition contains much irrelevant and redundant matter and much which is improperly pleaded.

Wherefore they pray judgment of the court whether they ought to make further or other answer to same and for costs.

GIVEN CAMPBELL,
Defts' Att'y.

And afterwards, at said term of said court, and on the 21st day of April, 1876, the following proceedings were had in said cause:

10 JAMES C. BABBITT, ASSIGNEE, &C., plaintiff, *vs.* JOHN SHIELDS ET AL., DEFENDANTS.

Now comes the plaintiff, by his attorney, and by leave of the court files the original bond for appeal, upon which this action is founded.

The said bond, so filed as aforesaid, is in words and figures as follows, to wit:

Bond.

Know all men by these presents that we, Edward Burgess , are held and firmly bound unto James C. Babbitt, assignee of E. Miller, bankrupt, in the full and just sum of eight thousand dollars, to be paid to the said James C. Babbitt, assignee of E. Miller, bankrupt, his heirs, executors, administrators, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals and dated this 28th day of March, in the year of our Lord one thousand eight hundred and seventy-two.

Whereas lately at the March term, A. D. 1872, of the district court of the United States for the western district of Missouri, in a suit depending in said court between James C. Babbitt, assignee of E. Miller, bankrupt, plaintiff, and Edward Burgess, defendant, judgment was rendered against the said Edward Burgess, and the said Edward Burgess, defendant, having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said
11 James C. Babbitt, assignee of E. Miller, bankrupt, citing and admonishing him to be and appear at a circuit court of the United States, to be holden at St. Louis the 1st Monday of April next:

Now the condition of the above obligation is such that if the said Edward Burgess shall prosecute said writ to effect, and answer all damages and costs if he fail to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

EDWARD BURGESS. [SEAL.]
JOHN FINN. [SEAL.]
JOHN SHIELDS. [SEAL.]

UNITED STATES OF AMERICA,
District of Missouri, ss:

I, John Finn, being duly sworn, on my oath say I am the identical person whose signature is affixed to the foregoing obligation as security for Edward Burgess; that I have property in the State of Missouri liable to execution of the value of ten thousand dollars over and above all liabilities and exemptions.

JOHN FINN.

Sworn and subscribed before me this 28th day of March, A. D. 1872.

F. A. WERNER,
Commis'r Circuit Court Districts of Missouri.

UNITED STATES OF AMERICA,
State of Missouri, ss:

I, John Shields, being duly sworn, on my oath do say that I am the identical person whose signature is affixed to the within foregoing obligation; that I have property in the State of Missouri liable to execution of the value of ten thousand dollars over and above all my liabilities and
12 exemptions.

JOHN SHIELDS.

Subscribed and sworn to by said John Shields, before me at office in St. Louis, Mo., this 28th day of March, A. D. 1872.

F. A. WERNER,
Commis'r U. S. Circuit Court Districts of Missouri.

Approved.

A. KREKEL, *Judge.*

And afterwards, at the said term of the said circuit court, the following further proceedings were had in this cause on Saturday, April 29th, 1876, to wit:

Demurrer overruled.

JAMES C. BABBITT, ASSIGNEE, &C., PLAINTIFF,
vs.
JOHN SHIELDS ET AL., DEFENDANTS.

Now come the said parties, by their attorneys, and the demurrer of defendants to the petition of plaintiff having been submitted and duly considered by the court, it is ordered that said demurrer be, and the same is hereby, overruled; and, on motion of defendants, by attorney, leave is granted to file answer on or before June 1st, 1876.

And afterwards, in vacation of said circuit court, and on the 1st day of June, 1876, the defendants filed their separate answers herein; and the said answers are in words and figures following, to wit:

Answer of Jno. Shields.

U. S. circuit court east'n dist. of Mo.

JAMES C. BABBITT, ASSIGNEE, &C.,
vs.
JOHN SHIELDS ET AL. No. 770.

13 Now comes the defendant, John Shields, and for his separate answer to the petition of plaintiff in above entitled cause denies all and singular the allegations therein contained, except such as may be hereinafter specially admitted to be true.

And, further answering, defendant admits the execution of the bond described and set out in said petition; admits that a writ of error, as alleged, was made, returnable, as alleged, into the circuit court as stated; admits that said cause was tried, as alleged, in said circuit court, wherein the judgment of the district court was affirmed; admits that a writ of error was allowed from said judgment of the circuit court returnable in the Supreme Court of the United States, and that said cause was thereby removed into said court on appeal.

And defendant, further answering, says that said defendant in said cause in said circuit court appealed by due and proper proceedings, by writ of error, from said judgment of the circuit court to the Supreme Court of the United States, and that on the second day of April, A. D. 1873, he filed his bond for an appeal on writ of error, conditioned according to law in such cases made and provided, with good and sufficient securities, in a sum sufficient to operate as a supersedeas, which said bond was approved by the judge of said circuit court, and an appeal on writ of error was allowed to said defendant to the Supreme Court of the United States; that by force and effect of said writ of error and bond the judgment of said circuit court of the United States was su-

14 perseded, rendered inoperative and vacated, and defendant was forever released and discharged from any and all liability upon said bond sued on.

And for a further defence the defendant says that said Supreme Court has affirmed the judgment of said circuit court, and that the mandate of

said Supreme Court has been filed, and that plaintiff has never taken proper proceedings to fix the liability of the sureties on said appeal bond given in said circuit court for appeal to the Supreme Court of the United States, either by suit or otherwise; that said sureties on said last mentioned bond are good & solvent and should be pursued to insolvency before the plaintiff can or ought to make any demand upon defendant, who does not intend to admit any liability on said bond, even then.

Defendant says that plaintiff has never issued any execution against said Burgess, the defendant in said cause, since the mandate aforesaid was filed.

And defendant denies that the condition of the bond sued upon has ever at any time, or in any manner, been broken, or that he is in any manner liable upon said bond, or that he is indebted to plaintiff in any sum or on any account whatsoever.

Wherefore defendant prays to be hence dismissed, with his costs.

GIVEN CAMPBELL,
Att'y for Def't.

15 *Answer of John Finn.*

U. S. circuit court, eastern district of Mo.

JAMES C. BABBITT, ASSIGNEE, &C., *vs.* JOHN SHIELDS ET AL. } No. 770. Answer of John Finn.

Now comes John Finn, one of the defendants in the above-entitled cause, and for his separate answer to said petition of plaintiff, denies all and singular the allegations therein contained, except such as may be hereafter specially admitted to be true.

And, further answering, defendant admits the execution of the bond mentioned and set forth in the said petition of plaintiff; admits that a writ of error as alleged was issued as alleged, returnable in the circuit court of the United States as alleged; admits that the cause upon which said writ was issued was tried in said circuit court, and that the judgment of the district court appealed from was affirmed; admits that this judgment of the circuit court aforesaid was removed to the Supreme Court of the United States, with the record of said cause, for review by said Supreme Court, upon a writ of error.

And defendant, further answering, says that said defendant in said cause, in said circuit court, appealed by due and proper proceeding from said judgment of the circuit court of the United States to the Supreme Court of the United States, and that on the second day of April, A. D. 1873, he filed his bond for an appeal on writ of error, conditioned according to law in such cases made and provided, with good and
16 sufficient securities, in a sum sufficient to operate as a supersedeas, and said bond was approved by the judge of said circuit court, and an appeal to operate as a supersedeas was allowed to said defendant from said judgment to the Supreme Court aforesaid; that, by force and effect of said appeal on writ of error and bond, the judgment of said circuit court of the United States was superseded and vacated, and defendant was forever released and discharged from any and all liability upon said bond sued on.

And, for a further defence, the defendant says that said Supreme Court has affirmed the judgment of said circuit court, and that the mandate of said court has been filed, and that plaintiff has never taken proper

proceedings to fix the liability of the sureties upon said bond given for said appeal to the Supreme Court, who are good and solvent, and who must be pursued by plaintiff to insolvency before he can have any recourse upon this defendant.

And defendant says that plaintiff has never issued any execution against said Burgess, the defendant, since the filing of said mandate of said Supreme Court, and defendant denies specially that there has ever been any breach of the condition of said bond sued on, or that he is in any manner liable upon same to plaintiff, or indebted to him in any amount or on any account.

Wherefore he prays that he be hence dismissed with his costs.

GIVEN CAMPBELL,
Att'y for Def't Finn.

17 And afterwards, at a regular term of said circuit court, begun and held on the third Monday, the 20th day of September, 1876, and on the 28th day of said month, the plaintiff filed his demurrer to parts of the separate answer of defendant John Shields, which said demurrer is in the words and figures following, to wit:

Demurrer to answer Shields.

U. S. circuit court.

JAS. C. BABBITT, ASSIGNEE, &C., *vs.* JOHN SHIELDS ET AL. } No. 770.

And now comes said plaintiff and demurs to the second defence set forth in the separate answer of said defendant Shields, commencing with the words, "and, further answering, defendant admits the execution of," in the 12th line of the first page of said answer, and continuing thenceforward to the close of said answer, for the reason that the same does not set forth any defence to this action.

MYERS & LITTON,
Att'ys for Pl'ff.

And at the term and on the day last aforesaid the plaintiff filed his demurrer to part of the separate answer of defendant John Finn, which said demurrer is in the words and figures following, to wit:

Demurrer to ans. of Finn.

U. S. circuit court.

JAS. C. BABBITT, ASSIGNEE, &C., *vs.* JOHN SHIELDS ET AL. } No. 770.

And now comes said plaintiff and demurs to the second defence set forth in the separate answer of said defendant Finn, commencing
18 with the words "and, further answering, defendant admits the execution of," in the fifteenth line of the first page of said answer, and continuing thenceforward to the close of said answer, for the reason that the same does not set forth any defence to this action.

MYERS & LITTON,
Att'ys for Pl'ff.

And afterwards, at said September term of said circuit court, the following further proceedings were had in said cause on the 6th day of October, 1876, to wit:

Demurrers overruled.

JAMES C. BABBITT, ASSIGNEE, &C., PLAINTIFF,
vs.
JOHN SHIELDS ET AL., DEFENDANTS.

The court having examined the questions of law arising upon the separate demurrers to the separate answers herein, and being fully advised in the premises, is of opinion that the law upon said demurrers is in favor of defendants, and it is ordered that said demurrers be, and the same are hereby, overruled.

And afterwards, at said September term of said circuit court, the following further proceedings were had in said cause on the 16th day of October, 1876, to wit:

Judgment.

JAMES C. BABBITT, ASSIGNEE, &C., PLAINTIFF,
vs.
JOHN SHIELDS ET AL., DEFENDANTS.

Now come the said parties, by their attorneys, the plaintiff by Nathaniel Myers, esquire, and defendants by Given Campbell, esquire, and the plaintiff electing to abide by his demurrers to the answers
19 herein, and declining to further plead herein, on motion of defendants, by their said attorney, it is ordered that judgment be entered in favor of defendants.

It is therefore considered by the court that the said plaintiff take nothing by his writ herein; that the defendants go hence without day, and have and recover against the said plaintiff their costs in this behalf expended, and have thereof execution.

And afterwards, at said September term, 1876, of said circuit court, and on the 19th day of October, the plaintiff filed a motion to set aside the judgment herein, which motion is in words and figures following, to wit:

Motion to set aside judgment.

In the U. S. circuit court, September term, 1876, east. dist. of Mo.

JAMES C. BABBITT, ASSIGNEE, &C., PLAINTIFF,
vs.
JOHN SHIELDS ET AL., DEFTS.

And now comes said plaintiff and prays the court to set aside the judgment rendered herein and to grant him leave to plead further herein, for the following reasons, to wit:

1st. Because said judgment was taken by counsel for defendants through a misunderstanding between him and counsel for plaintiff, on account of which misunderstanding plaintiff's counsel failed to plead to

the answers of said defendants after the overruling of the demurrer herein, and without fault on the part of plaintiff or his attorney.

2d. Because such judgment was improvidently rendered.

NATH'L MYERS, *For Pl'ff.*

20 And afterwards, at said September term of said circuit court, the following further proceedings were had in said cause, on the 23d day of October, 1876, to wit:

Judgment set aside.

JAMES C. BABBITT, ASSIGNEE, &C., PLAINTIFF,
vs.
JOHN SHIELDS ET AL., DEFENDANTS.

Now come the said parties by their attorneys—the plaintiff by Nathaniel Myers, esquire, and the defendants by Given Campbell, esquire—and by consent the judgment on demurrer heretofore entered is hereby set aside. And thereupon the said parties, by their said attorneys, file a stipulation waiving a jury. And thereupon the plaintiff, by said attorney, presents to the court his bill of exceptions to the ruling of the court in overruling the demurrers to parts of the separate answers herein, which bill of exceptions is signed by the judge and ordered to be filed and made part of the record herein. Whereupon the plaintiff, by his attorney, files separate replications to the answers herein, and the defendants, by their said attorney, file their motion for judgment on the pleadings, which motion being submitted and the court being fully advised in the premises, it is ordered that said motion be and the same is hereby sustained.

Judgment.

It is therefore now considered by the court that the said plaintiff, James C. Babbitt, assignee in bankruptcy of E. Miller, take nothing by his writ herein; that the defendants, John Shields and John Finn, go hence without day, and have and recover against said plaintiff the costs herein expended, and have thereof execution. To the ruling of the court in sustaining the motion for judgment on the pleadings the
21 plaintiff, by attorney, duly excepted.

The said bill of exceptions, so filed as aforesaid, is in the words and figures following, to wit:

Bill of exceptions.

U. S. circuit court, east. dist. of Mo.

J. C. BABBITT, ASSIGNEE, &C., PLAINTIFF,
vs.
JOHN SHIELDS ET AL., DEFTS.

Be it remembered that on the 6th day of October, 1876, the demurrers heretofore filed herein to portions of the separate answers of the defendants herein were by the court overruled, to which action of the court the plaintiff then and there excepted, and now prays that this, his bill of exceptions, may be signed and sealed and made part of the record, which is hereby accordingly done.

SAMUEL TREAT,

And the replications, so filed as aforesaid, to the separate answers of defendants are in words and figures as follows, to wit:

Reply to ans. of Shields.

U. S. circuit court, east. dist. of Mo., Sept. term, 1876.

JAMES C. BABBITT, ASSIGNEE, &C., PLFF.,
vs.
JOHN SHIELDS ET AL., DEFT.

And now comes said plaintiff, and for a replication to the separate answer of said defendant Shields denies that he has never taken proper proceedings to fix the liability of the sureties on said appeal-bond given in said circuit court, denies that either of the sureties on said appeal-bond given was or is good or solvent, as alleged in said answer, and denies that execution has not been issued against said Burgess since said mandate was filed in this court; and prays judgment as in his said petition he has already prayed.

NATH'L MYERS,
22 *Att'y for Pl'ff.*

Reply to ans. of Finn.

U. S. circuit court, east. dist. of Mo., Sept. term, 1876.

JAMES C. BABBITT, ASSIGNEE, &C., PLFF.,
vs.
JOHN SHIELDS ET AL., DEFTS.

And now comes said plaintiff, and for a replication to the separate answer of said defendant Finn denies that he has never taken proper proceedings to fix the liability of the sureties on said appeal-bond given in said circuit court, denies that either of the sureties on said appeal-bond given *in said circuit court, denies that either of the sureties on said appeal-bond given*, was or is good or solvent, as alleged in said answer, and denies that execution has not been issued against said Burgess since said mandate was filed in this court; and prays judgment as in his said petition he has already prayed.

NATH'L MYERS,
Att'y for Pl'ff.

And the said motion for judgment, so filed as aforesaid, is in words and figures following, to wit:

Motion for judgment.

U. S. circuit court, east'n district of Missouri.

JAS. C. BABBITT, ASSIGNEE, &C.,
vs.
JOHN SHIELDS & JOHN FINN.

Now comes Given Campbell, attorney for the defendants in aforesaid cause, and upon suggesting to the court that upon the pleadings in this case no cause of action is stated against these defendants, moves the

court for judgment upon the pleadings in favor of defendants and against plaintiff, with costs.

23 GIVEN CAMPBELL,
Att'y for Defendants.

And afterwards, at said September term, 1876, of said circuit court, the following further proceedings were had in said cause on the 6th day of November, to wit:

Writ of error allowed.

JAMES C. BABBITT, ASSIGNEE, &C., PLAINTIFF,
vs.
JOHN SHIELDS ET AL., DEFENDANTS.

Now the plaintiff, by his attorney, and presents to the court a writ of error to remove this cause to the Supreme Court of the United States, and a citation citing and admonishing the said defendants to be and appear at a Supreme Court of the United States on the second Monday of October next, which said writ of error is allowed by the court, and said citation signed by the judge; and the plaintiff, by his said attorney, also presents the bond required upon the allowance of a writ of error, which bond is approved by the court and ordered to be filed.

Which said bond, so filed as aforesaid, is in the words and figures following, to wit:

Bond.

Know all men by these presents that we, James C. Babbitt, assignee of E. Miller, bankrupt, & A. M. Lay, are held and firmly bound unto John Shields & John Finn in the full and just sum of five hundred dollars, to be paid to the said John Shields and John Finn, their heirs, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and adminis-
24 trators, jointly and severally, by these presents, sealed with our seals, and dated this 28th day of October, in the year of our Lord one thousand eight hundred and seventy-six.

Whereas lately at the September term, 1876, of the circuit court of the United States for the eastern district of Missouri, in a suit depending in said court between James C. Babbitt, assignee in bankruptcy of E. Miller, bankrupt, plaintiff, and John Shields and John Finn, defendants, judgment was rendered against the said plaintiff, and the said plaintiff having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said John Shields and John Finn, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now the condition of the above obligation is such that if the said plaintiff shall prosecute said writ to effect, and answer all damages and costs if he fail to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

JAMES C. BABBITT, [SEAL.]
Assignee of E. Miller, bankrupt.
A. M. LAY. [SEAL.]

Approved by—

SAMUEL TREAT, *Judge.*

25 UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

I, M. M. Price, clerk of the circuit court of the United States in and for the eastern district of Missouri, do hereby certify that the writing hereto annexed is a full and complete transcript of the record and proceedings had in the case of James C. Babbitt, assignee, &c., plaintiff, vs. John Shields and John Finn, defendants, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office in the city of St. Louis, in said district, this eighth day of December, in the year of our Lord eighteen hundred and seventy-six.

[SEAL.]

M. M. PRICE,
Clerk of said Court,
By A. P. SELBY, *Deputy.*

(Indorsement on cover:) No. 335. James C. Babbitt, assignee of E. Miller, a bankrupt, plaintiff in error, vs. John Shields and John Finn. E. Missouri C. C. U. S. Filed 12th February, 1877.

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1879.

JAMES C. BABBITT, *Assignee, etc.*,
Plaintiff in Error,

vs.

JOHN SHIELDS and
JOHN FINN,
Defendants in Error.

No. 106.

Error to the United States Circuit Court for the Eastern District of Missouri.

STATEMENT AND POINTS FOR PLAINTIFF IN ERROR.

NATH'L MYERS,
For Plaintiff in Error.

St. Louis: Press of G. I. Jones & Co.

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1879.

JAMES C. BABBITT, *Assignee, etc.*,
Plaintiff in Error,

vs.

JOHN SHIELDS and
JOHN FINN,
Defendants in Error.

No. 106.

Error to the United States Circuit Court for the Eastern District of Missouri.

STATEMENT AND POINTS FOR PLAINTIFF IN ERROR.

This is an action brought against the sureties upon a *supersedeas* bond, given in taking a certain cause from the District to the Circuit Court for the Western District of Mis-

souri. Plaintiff alleges he procured judgment against one Miller, in the District Court, for $4,236.28; that Miller took the case, by writ of error, to the Circuit Court, and gave the *supersedeas* bond, in the sum of $8,000, here sued on, the condition of which is as follows: "Now, the condition of the above obligation is such that, if the said Edward Burgess shall prosecute said writ to effect, and answer all damages and costs if he fail to make good his plea, then the above obligation to be void; else to remain in full force and virtue." For a breach of the bond, plaintiff alleges that "said Burgess did not prosecute said writ to effect, nor answer all or any damages or costs on failing to make good his said plea," but that the Circuit Court affirmed said judgment of the District Court, and that said judgment is still in full force and unsatisfied; that payment has been demanded of Burgess, but he has refused it; and that Burgess has nothing whereon to levy an execution. (Rec., pp. 2, 3, 4.) The bond thus sued on does not contain the names of the sureties in the body of it. They simply signed and sealed it. (Rec., p. 3.)

The defendants demurred to this petition, and the demurrer was overruled. (Rec., p. 7.) They then answered, admitting the execution of the bond sued on, and the breach of its condition by the affirmance of the judgment. They then set up that, after such affirmance, the defendant (Burgess) took the case, by writ of error, from the Circuit Court to this court, and gave a new *supersedeas* bond, and that this court affirmed the judgment; and that by said second bond and writ of error "the judgment of said Circuit Court of the United States was superseded, rendered inoperative, and vacated, and defendants were forever released and discharged from any and all liability upon said bond sued on."

For a further defence, defendants aver that plaintiff has not sued out execution against Burgess, nor pursued the sureties on the second appeal-bond, and that said sureties are solvent. (Rec., pp. 7, 8, 9.)

To these special affirmative defences plaintiff demurred, and his demurrer was overruled. (Rec., pp. 9, 10.)

Thereupon plaintiff filed a replication, denying the new matter set up in the answer (rec., p. 12); whereupon, on motion of defendants' attorney, the court rendered judgment for defendants. (Rec., p. 11.) Plaintiff now brings the cause here by writ of error.

ASSIGNMENT OF ERRORS.

1. The court below erred in overruling plaintiff's demurrer to the affirmative defences.

2. The court below erred in rendering judgment for defendants on the pleadings.

3. The court below erred in not rendering judgment for plaintiff on the pleadings.

POINTS AND AUTHORITIES.

I.

The answer admitted the bond and breach. This entitled plaintiff to judgment on the pleadings, unless the special matter pleaded constituted a defence in law.

II.

The omission of the names of the sureties in the body of the bond was immaterial.

Pequawkett *v.* Mathers, 7 N. H. 230;
Martin *v.* Dorch, 1 Stew. 479;
Keeton *v.* Spradling, 13 Mo. 321;
Johnson *v.* Steamboat, 13 Mo. 539;
Cunningham *v.* The State, 14 Mo. 402;
Cooke *v.* Crawford, 1 Texas, 9;
Brandt on Sureties, sect. 15, and authorities there cited.

III.

The liability of the sureties was fixed by the affirmance of the judgment of the District Court by the Circuit Court. That was a breach of the condition to prosecute the writ of error with effect.

Karthaus *v.* Owings, 6 Har. & J. 134.

IV.

It was not necessary to sue out execution against the original judgment-debtor.

Smith *v.* Ramsay, 6 Serg. & R. 573;
Anderson *v.* Sloan, 1 Col. 487;
Wood *v.* Derrickson et al., 1 Hilt. 410;
Tissot *v.* Darling, 9 Cal. 285;
Brandt on Sureties, sect. 404;
Smith *v.* Gaines, 3 Otto, 341.

V.

The second writ of error did not annul the original judgment of affirmance, nor discharge the sureties on the original *supersedeas* bond.

Dolby *v.* Jones, 2 Dev. (N. C.) 109;
Ashby *v.* Sharp, 1 Litt. (Ky.) 156;
Jordan *v.* Agawam Woollen Co., 106 Mass. 571;
Storrs Bros. *v.* Engel & Son, 19 N. B. R. 90;
Hinckley *v.* Kreitz, 58 N. Y. 583;
Smith *v.* Falconer, 11 Hun (N. Y.), 481;
Gillette *v.* Bullard, 20 Wall. 571;
Rev. Stat. U. S., p. 187, sect. 1000;
Smith *v.* Crouse, 24 Barb. 433;
Richardson *v.* Krapf, 5 Daly, 385;

Gardner *v.* Barney, 24 How. Pr. 467;
Robinson *v.* Plimpton, 25 N. Y. 484;
Kellar *v.* Williams, 10 Bush, 216;
Brandenburg *v.* Flynn's Administrator, 12 B. Mon. 399;
Nathan *v.* Potts, 1 Rawle & W. 397;
Patterson *v.* Pope, 5 Dana, 241.

VI.

For above reasons, final judgment should be rendered here for plaintiff, as no defence whatever is set up.

NATH'L MYERS,
For Plaintiff in Error.

IN THE

Supreme Court of the United States

No. 106.

OCTOBER TERM, A. D. 1879.

JAMES C. BABBITT, ASSIGNEE OF E. MILLER, A BANKRUPT,
Plaintiff in Error,

vs.

JOHN SHIELDS AND JOHN FINN,
Defendants.

STATEMENT AND BRIEF FOR DEFENDANTS.

GIVEN CAMPBELL,
Attorney for Defendants.

John J. Daly & Co., Printers, 813 North Third Street, St. Louis.

IN THE

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Plaintiff in Error,

vs.

JOHN SHIELDS AND JOHN FINN,
Defendants.

STATEMENT AND BRIEF FOR DEFENDANTS.

THE PLEADINGS STATED.

The petition substantially states that plaintiff, on the 27th of March, 1872, obtained judgment against one Burgess for $4,236.28 in the District Court of the United States for the Eastern District of Missouri; that on the 29th of March, 1872, Burgess carried the case to the Circuit Court by a writ of error, giving bond usual in such case to operate a *supersedeas*, in

the sum of $8,000, with defendants as sureties on the bond; that Burgess did not prosecute his writ to effect, but that on the 22d of March, 1873, the judgment of the District Court was affirmed by the said Circuit Court, with costs; that the case was carried from the Circuit to the Supreme Court of the United States, where the judgment of the Circuit Court was affirmed, and plaintiff alleged that the judgment of the District Court was still in force and unsatisfied, that Burgess was insolvent, and prayed judgment against defendants for $6,000. (The Bond sued on is at page 6, of Record.)

The defendants filed separate but similar answers, starting out with a general denial, excepting subsequent admissions, and for a special defense alleged that when the District Court rendered said judgment against Burgess, he took the case by writ of error, to the Supreme Court, giving bond in a sum sufficient to operate a *supersedeas;* that by the writ of error and bond aforesaid the judgment of the Circuit Court in said cause was *superseded*, vacated and rendered inoperative, and thereby defendants, as sureties, were forever discharged from liability on the bond sued on. The answers set out other matters of defense.

The plaintiff demurred to this part of the answers, and this demurrer was overruled, and judgment rendered in favor of defendants.

This judgment was set aside, and the plaintiff filed replies to the answers, denying the new matter set up in the last parts of the answers, but not denying the special defense of discharge by reason of the writ of error, new bond and supersedeas, Record, p. 12.

Defendants then moved the Court to render judgment in

their favor, upon the pleadings. Record 12 and 13. This motion was allowed by the Court, a jury was waived, and the cause submitted to the Court, and final judgment rendered, dismissing the suit.

To the action of the Court the plaintiff excepted and the bill of exceptions is set out. (Record p. 11.)

ARGUMENT.

The only question for consideration is, did the Court err in rendering judgment in favor of defendants upon the pleadings, petition, answers and replies?

The plaintiff waived the demurrer when he filed his replies. Hence the action of the Court upon the demurrers of plaintiff cannot be urged as error, here.

It is insisted, on behalf of defendants, that the judgment was proper, that the new bond from the Circuit Court, the writ of error and *supersedeas* operated as a discharge of the sureties on the bond sued on, *i. e.*, the bond given in the District Court.

First.—The nature of an appeal bond.

It is intended as a bond of *indemnity to secure the payment of the debt* (as evidence by the judgment of the Court), if the defendant fails in the Appellate Court. See Rule 29, of Supreme Court of United Sates.

Evans v. Hardwick, 1 J. J. Marshall, p. 435.
Morris v. Barclay, &c., 3 J. J. Marshall, p. 376.
Moore v. Gorin, 2 Littell (Ky.), 186.
Sumrall et al. v. Reid, 2 Dana, 65.

It is with this view that it is required to be in double the amount of the judgment below.

Shannon and wife v. Spencer, 1 Blackf., 120.

Norwood v. Martin, 3 Har. & John, 199.

Parker v. Han. & St. Joe R. R. Co., 44 Mo., 415.

This Court must have had in view the fact that at common law, sureties were not liable beyond the Court for which they stipulated, or they would not have so carefully provided rules 4 and 10 in admiralty, in the manner in which they are drawn.

The appeal from the Circuit to the Supreme Court, so far as the judgment of the former affected these defendants, sureties on the bond from the District to the Circuit Court, vacated said judgment.

See Payne v. Cowan, 17 Pick., 142.

It has been held that a judgment will be vacated when an appeal therefrom has been allowed, and an action of debt cannot be maintained upon it.

Atkins v. Wyman, 45 Maine, 399.

Campbell v. Howard, 5 Mass., 376.

Keen v. Turner, 13 Mass., 266.

State of Ohio v. Commercial Bank of Cincinnati, 7 Ohio, 129.

Clark Gale v. R. Butler, Jr., 35 Vermont, 449.

The bond from the District to the Circuit Court was not given as security for the solvency of the sureties on the bond from the Circuit Court, but was given to secure the judgment of the Circuit Court.

If the bond from the District to the Circuit Court still remained, why was it necessary to have a bond from the Circuit to the Supreme Court in *double* the amount of the judgment of the Circuit Court? If this judgment were already secured, no new bond, except for costs, should be

required or would be necessary to carry the case up to the Supreme Court. Such is the course in admiralty, in many of the circuits, in admiralty appeals, where stipulations have been taken under rules 4 and 10.

After the bond in the Circuit Court is approved and *supersedeas* allowed, the Circuit Court has not the judgment in its power—no further step can be taken in that court—hence the judgment cannot be enforced against the principal on the appeal bond from the District to the Circuit Court. The new bond, operating a *supersedeas*, stayed all proceedings, and rendered the first bondsmen powerless to fulfil the condition of the bond.

It has been held that where property seized under execution has been released upon a forthcoming bond, and an appeal is taken before the day of sale mentioned in the forthcoming bond, that the appeal bond operating a *supersedeas*, discharged the sureties on the forthcoming bond.

A forthcoming bond, given to answer an execution levied upon lands, discharges the lien of the judgment.

See Brown v. Clark, 4 How., 14.

Freeman on Judgments, secs. 380, 381.

The bond given for release of attachment discharges the property from the lien of the attachment.

St. Louis Perpetual Ins. Co. v. Ford, 11 Mo., p. 295.

Suydam v. Huggeford, 23 Pick., p. 465.

In admiralty, where the vessel is libelled upon a lien claim, the release bond discharges the vessel from the lien—the bond takes the place of the vessel for the security of the debt for which the lien had existed.

Many cases can be found where it is held that where a

second replevin bond is given and accepted, it discharges the first.

Chancellor v. Van Hook & Brooking, 2 Ben Monr, p. 447.

The above analagous cases are cited because authority upon the exact question is not abundant.

It is elementary that there are no presumptions against sureties.

They have the right to stand upon the very letter of their contract. The contract cannot be changed without their consent, though beneficial, without releasing them. The surety's obligation vanishes with that of his principal, *sublato fundamento cadit opus.*

There is a privity between the surety and creditor which compels the latter to preserve all his rights against the debtor unimpaired.

The undertaking, in plain words, of defendants was that the principal, Burgess, should be good for the judgment when rendered in the Circuit Court, and that if he did not pay it then, or otherwise indemnify and satisfy plaintiff, that the defendants would do so for him.

This was their contract, and it should not be enlarged or extended by inference or analogy; they should not be held to a more onerous one.

When Burgess gave his bond for writ of error and *supersedeas* to the Supreme Court, he did indemnify plaintiff to his satisfaction, and *secured* his debt evidenced by the judgment of the Circuit Court, and in consideration of such indemnity and security, Burgess was allowed to have his cause heard in the Supreme Court.

It surely cannot be contended that these sureties (the de-

fendants) on the first bond are to be regarded as sureties to plaintiff for the solvency of the sureties on the bond from the Circuit to the Supreme Court, or for *the continuing solvency* of the principal on that bond. They might be willing to underwrite the solvency of Burgess until his cause was decided in the Circuit Court, but entirely unwilling to risk his solvency for two years longer, pending an appeal in this court.

Such an extension of their liability would be making a new and more onerous contract for them, and no one can make such change, not the law itself.

The counterpart of this case I have been unable to find. It is fair to presume that no one ever before attempted to hold sureties under such circumstances.

It seems to us that the bond given for writ of error to the Supreme Court is substituted, as it were, for the judgment of the Circuit Court, takes its place, *so far as these defendants are concerned*, and it is *as to them* as if it had never existed—entirely extinguished. It is, therefore, respectfully submitted that the judgment of the Circuit Court should be affirmed.

GIVEN CAMPBELL,
Attorney for Defendants.